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Supreme Court of the United States

OCTOBER TERM, 1953

No. 388

WHEELING DOLLAR SAVINGS AND TRUST COMPANY, as Executor of the Estate of CHARLES J. WOLF, Deceased,
Petitioner,

v.

F. ROY YOKE, COLLECTOR OF INTERNAL REVENUE

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT AND SUPPORTING BRIEF

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INDEX

Page

Jurisdictional Statement 1

Summary Statement of the Matter Involved 2

Questions Presented 4

Reasons Relied Upon For Allowance of the Writ and Argument Relating Thereto 5

I. The United States Court of Appeals for the Fourth Circuit So Far Departed From the Accepted and Usual Course of Judicial Proceedings as to Call for an Exercise of This Court's Power of Supervision 5

II. The Decision of the United States Court of Appeals for the Fourth Circuit in the Case at Bar Conflicts in Principle With Decisions of Other Circuits on the Same Subject 9

LIST OF AUTHORITIES

Cases

Brown v. Commissioner (CCA 3-1942) 131 F. (2d) 640 9

Brown v. Norfolk & W. Ry. Co. (1927), 20 F. (2d) 133 7

Buck; Commissioner v. (CCA 2-1941) 120 F. (2d) 775 .9, 12

Clifford; Helvering v. (1940), 309 U. S. 331, 60 S. Ct. 554, 84 L. Ed. 788 ..... 4, 9

Commissioner v. Buck (CCA 2-1941) 120 F. (2d) 775 .9, 12

Cushman v. Commissioner (CCA 2-1946) 153 F. (2d) 510 ..... 10, 11, 13

Dorchy v. Kansas (1926), 272 U. S. 306, 71 L. Ed. 248 . 6, 7

Edison v. Commissioner (CCA 8-1945) 148 F. (2d) 810 9

Hall v. Commissioner (CCA 10-1945) 150 F. (2d) 304 9, 10, 11, 12

Helvering v. Clifford (1940), 309 U. S. 331, 60 S. Ct. 554, 84 L. Ed. 788 ..... 4, 9

Helvering v. Wood (1940), 309 U. S. 344, 84 L. Ed. 796 13 fn. 1

Page

Jones v. Norris (CCA 10-1941) 122 F. (2d) 6 10
Miller v. Commissioner (CCA 6-1945) 147 F. (2d) 189 12
Pennsylvania Co. v. Bender (1893), 148 U. S. 255, 37 L. Ed. 441 6
Shapero v. Commissioner (CCA 6-1948) 165 F. (2d) 811 12, 13
South Carolina v. Wesley (1895), 155 U. S. 542, 39 L. Ed. 254 ..... 6, 7
Stuart v. Commissioner (1942), 317 U. S. 154, 87 L. Ed. 154 13
Thornton v. Carson, 7 Cranch 596, 3 L. Ed. 451 5
United States v. Morss (CCA 1-1947) 159 F. (2d) 142 12
Williamson v. Commissioner (CCA 7-1942) 132 F. (2d) 489 9
Young v. Commissioner (1945), 5 T. C. 1251 .....3, 4, 7, 8

STATUTES AND MISCELLANEOUS

Internal Revenue Code: Section 22(a) 4
Regulations 111, Sec. 29.22(a)-21 14
Section 1254 of Title 28, U. S. C. (62 Stat. 928) 1
4 CJS, Appeal and Error, Sec. 1206 5
5 CJS, Appeal and Error, Sec. 1481 5

Supreme Court of the United States

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No.

WHEELING DOLLAR SAVINGS AND TRUST COMPANY, as Executor of the Estate of CHARLES J. WOLF, Deceased,
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v.

F. ROY YOKE, COLLECTOR OF INTERNAL REVENUE

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT AND SUPPORTING BRIEF

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

The petitioner prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fourth Circuit in the above-entitled cause.

JURISDICTIONAL STATEMENT

The judgment of the United States Court of Appeals for the Fourth Circuit was entered on May 27, 1953. (R. 27). A petition for rehearing was filed on June 24, 1953 (R. 28), and was denied on July 6, 1953. (R. 61). The opinion of the Court of Appeals (R. 19-27) is reported in 204 F. (2d) 410. The jurisdiction of this Court is invoked under Section 1254 of Title 28, U. S. C.

SUMMARY STATEMENT OF THE MATTER INVOLVED

Petitioner is the duly acting and qualified executor of the Estate of Charles J. Wolf, who died on September 1, 1946, a resident of Wheeling, West Virginia. (R. 3). This is an action for the recovery of deficiencies in income tax paid by petitioner for the taxable periods of decedent from January 1, 1937, to September 1, 1946, inclusive. (R. 4).

Decedent never married. (R. 3). On November 3, 1937, and from motives of love and affection, decedent created five irrevocable trusts: one for the benefit of his sister, Mrs. Ruth Levi, then age 59 and domiciled in Brookline, Massachusetts; and one each for the benefit of his four nephews: Marc J. Wolf, then age 36 and domiciled in Indianapolis, Indiana; Charles H. Wells, then age 28 and domiciled in Pittsfield, Massachusetts; Robert E. Levi, then age 26 and domiciled in Boston, Massachusetts; Harry Levi, Jr., then age 23 and domiciled in Brookline, Massachusetts. (R. 3-5). These beneficiaries were the decedent's sole relatives. (R. 3). None of them was in need of financial assistance when the trusts were created. (R. 15-16).

From time to time, each of the beneficiaries received distributions of income from the trusts. (R. 5). The property in each trust was to revert to decedent if the beneficiary predeceased him. (R. 11, 13). Each of the beneficiaries survived decedent. (R. 3).

The trust for Mrs. Ruth Levi was to terminate upon decedent's death. (R. 13, 14). The trusts for decedent's nephews were to terminate upon decedent's death if the nephews were then 30 years of age; otherwise, they were to continue after decedent's death until the nephews reached 30 years of age. (R. 11).

The five trusts were substantially identical in terms. (R. 9-14). Each of them named decedent as trustee. (R. 9, 12). Each of them gave decedent, as trustee, broad powers of management over corpus. (R. 9-10, 12-13). Each of them gave decedent, as trustee, power to accumulate income. (R. 10, 13). None of them gave decedent, as trustee or

otherwise, any power over the distribution of income or corpus, any power to change beneficiaries, or any power to amend. (R. 9-14).

Following the death of decedent, income tax deficiencies were assessed against his estate on the ground that the income of each of the aforementioned trusts constituted income of decedent for tax purposes. (R. 3-4). Petitioner paid the deficiencies and filed timely claims for refund. (R. 3). The claims were rejected; thereupon, petitioner filed a suit for refund in the United States District Court for the Northern District of West Virginia. (R. 1, 3). The action was submitted for decision to the District Court on the pleadings, a stipulation of facts, affidavits, and briefs. (R. 1). Without entering any formal findings of fact, the District Court entered judgment for respondent. (R. 1-2). Petitioner appealed to the United States Court of Appeals for the Fourth Circuit. (R. 19).

The stipulation filed in the District Court contained the following statement (R. 4):

> "* * *. The said Charles J. Wolf is the one and same Charles J. Wolf named in Young v. Commissioner, 5 T.C. 1251. * * *"

Using this reference as a basis, the Court of Appeals for the Fourth Circuit read into the record of the present case facts contained only in the record of *Young* v. *Commissioner* (1945), 5 T.C. 1251. Those facts are set forth in two full paragraphs of the Court's opinion. (R. 21). They purport to relate to the manner in which Charles J. Wolf might have used for his own benefit the trusts which he created. That subject was broadly covered in the stipulation of facts filed in the District Court which stated (R. 5):

> "* * *. Charles J. Wolf at no time received any part of the trust income or principal for his own use or benefit."

Relying heavily upon the facts which it extracted from the record in the *Young* case (R. 26), the Court of Appeals affirmed the judgment of the District Court. (R. 27). Petitioner filed a petition for rehearing, specifically objecting to the incorporation and use of facts from the *Young* case by the Court of Appeals.

In an appendix to that petition, petitioner set forth a full statement of the transactions of the trusts created by Charles J. Wolf which supported the proposition that Wolf had not benefited personally from said trusts. (R. 30-33). The Court of Appeals was requested to reconsider, or to remand the case to the District Court if it was not satisfied with the stipulated facts. (R. 33). Instead, it simply denied the petition for rehearing. (R. 61). Thereupon, petitioner filed this petition for a writ of certiorari.

QUESTIONS PRESENTED

The first question raised by this petition is whether the Court of Appeals for the Fourth Circuit erred when it relied upon facts in the record of the *Young* case in deciding the case at bar.

The ultimate question raised by this petition is whether Charles J. Wolf retained such powers over the trusts created by him as would justify treating him as the owner of those trusts and as taxable on their income under Section 22(a) of the Internal Revenue Code and *Helvering* v. *Clifford* (1940), 309 U.S. 331, 60 S. Ct. 554, 84 L. Ed. 788.

REASONS RELIED UPON FOR ALLOWANCE OF THE WRIT AND ARGUMENT RELATING THERETO

I

The United States Court of Appeals for the Fourth Circuit So Far Departed From the Accepted and Usual Course of Judicial Proceedings as to Call for an Exercise of This Court's Power of Supervision.

One of the basic principles of appellate jurisdiction is that an appellate court may not consider matters dehors the record in deciding a case presented to it for review. This principle was asserted by this Court as early as 1813 in *Thornton* v. *Carson*, 7 Cranch 596, 3 L. Ed. 451. It is stated as follows in 4 CJS, Appeal and Error, Sec. 1206:

> "It is a general rule of wide, although not universal or absolutely inflexible, application, that an appellate court can consider nothing that is not contained in the record, and will decide the case, and the questions raised only on the basis of the record presented. The appellate court can only take the record as it finds it, and cannot add thereto, or go behind, beyond, or outside it; and it will not prosecute an independent inquiry, or indulge in surmise or assumption as to matters not in the record. The sole question which such court is required to determine is whether the judgment which is the subject of review is a legitimate conclusion from the premises which the record contains."

Included within the prohibition of the above-mentioned principle are matters contained in the records of other proceedings unless those records have been introduced in evidence in the proceeding under review. This rule is summarized in 5 CJS, Appeal and Error, Sec. 1481, as follows:

> "Each case must be decided on its own record and ordinarily the reviewing court will not consider the pleadings, evidence, findings, proceedings, rulings, judgment, or other matters of record in another case, or in the same case on a former trial or appeal, or in another distinct phase or part of the same litigation,

where the other record has not been introduced in evidence and made a part of the present record. Certainly, it will not do so for the purpose of supplying defects in the present case or for the purpose of reviewing either directly or indirectly a case or matter not properly before it on the present appeal. * * *."

This Court has consistently followed the above-described rule. In *South Carolina* v. *Wesley* (1895), 155 U.S. 542, 544, 39 L. Ed. 254, this Court said:

> "Our attention is called to the transcript of the record in the case of *Tindal* v. *Wesley*, pending on error in the Circuit Court of Appeals for the Fourth Circuit, attached to the brief of counsel for the state, but reference cannot properly be had to a transcript of the record in a case pending in another court to supply defects in the record of a case in this court * * *."

And, in *Dorchy* v. *Kansas* (1926), 272 U.S. 306, 310-311, 71 L. Ed. 248, it stated:

> "Besides these facts, which appear by the bill of exceptions, the state presents for our consideration further facts which appear by the record in *State ex rel. Hopkins* v. *Howat*, 109 Kan. 376, 25 A.L.R. 1210, 198 Pac. 686, 258 U.S. 181, 66 L. Ed. 550, 42 Sup. Ct. Rep. 277, one of the cases referred to by the supreme court of Kansas in its first opinion in the case at bar. [Here followed various facts.] These additional facts were not put in evidence in the case at bar. *State ex rel. Hopkins* v. *Howat*, 109 Kan. 376, 25 A.L.R. 1210, 198 Pac. 686, was a wholly independent proceeding. Mere reference to it by the court as a controlling decision did not incorporate its record into that of the case at bar. See *Pacific R. Co.* v. *Missouri P. R. Co.* 111 U. S. 505, 517, 518, 28 L. Ed. 498, 502, 503, 4 Sup. Ct. Rep. 583. And it does not appear that the court treated these facts as matters of which it took judicial notice. We must dispose of the case upon the facts set forth in the bill of exceptions."

See also *Pennsylvania Co.* v. *Bender* (1893), 148 U.S. 255, 37 L. Ed. 441.

The Fourth Circuit itself observed a similar limitation on its powers in deciding *Brown* v. *Norfolk & W. Ry. Co.* (1927), 20 F. (2d) 133, in which it said (p. 134):

> "In this court plaintiff cited cases in which the company had relied upon the rule in question as applicable to passenger trains; but there was nothing of the sort in the record in this case, and we cannot consider as a part of the record what may or may not have been shown or done in a case not before us. * * *"

Despite this Court's decisions in *South Carolina* v. *Wesley, supra,* and *Dorchy* v. *Kansas, supra;* and despite its own decision in *Brown* v. *Norfolk & W. Ry. Co., supra,* the Court of Appeals here relied upon facts contained in the record of *Young* v. *Commissioner* (1945), 5 T.C. 1251, *supra,* but not in the record of the case at bar, as indicating that Charles J. Wolf used the trusts involved in this case for personal purposes as part of a scheme of tax evasion. It said:

> "The actual use of these powers by Wolf is not shown completely in the record in this case. The taxpayer has not offered to show what part of the income Wolf paid to the beneficiaries or how he invested the principal and income of the trusts; but the stipulation refers to the Young case and from that we learn that under practically identical trust instruments, Young invested the trust funds in his own theatrical business and used the trust estates to disguise a distribution to himself of corporate profits in an attempt to escape the income taxes thereon. The report of that decision indicates that Wolf made similar use of the trust properties which he held as trustee; but even if we should shut our eyes to this fact on the ground that the findings as to Wolf in the Young case were not formally included in the stipulation in the pending case, as the appellant urges, the potentialities of enjoyment and control inherent in the Wolf trusts are still graphically illustrated."

No facts in the record of the case at bar indicate that Chares J. Wolf created his trusts either for use to his

personal advantage or to avoid taxes. On the contrary, the record in the case at bar plainly states that "Charles J. Wolf at no time received any part of the trust income or principal for his own use or benefit," and that "payment of income was made at intervals to the named beneficiaries." (R. 5).

The *Young* case involved different parties and different counsel than the case at bar. It also involved different facts than the case at bar, for Young not only borrowed from his trusts but also failed to make any substantial distributions of income to their beneficiaries. Moreover, the *Young* case contained an important issue not present in the case at bar; namely, whether a transfer of stock in Theatrical Managers, Inc. to the Young trusts at book cost to the transferor resulted in a constructive dividend to Young. The Tax Court held that this transfer did result in a constructive dividend to Young. Taken by itself, the decision of the Tax Court on this issue would merely seem to indicate that Young made additional contributions to his trusts in the amount of said constructive dividend, and not that Young was guilty of any attempt to evade taxes.

Facts of record in the case at bar cannot be overcome by inferences which it might be possible to draw from the record in the *Young* case. Particularly is this true since petitioner had no opportunity to rebut or explain those facts derived from the record of the *Young* case which neither appear in this record nor apply in the case at bar. The reliance placed upon facts in the record of the *Young* case by the Court of Appeals for the Fourth Circuit was both prejudicial to petitioner and improper. It cannot be regarded as either accepted or usual in a Federal judicial proceeding. Since the Fourth Circuit refused to rectify its error, the intervention of this Court becomes necessary.

II

The Decision of the United States Court of Appeals for the Fourth Circuit in the Case at Bar Conflicts in Principle With Decisions of Other Circuits on the Same Subject.

In the 13 years since *Helvering* v. *Clifford* (1940), 309 U.S. 331, 84 L. Ed. 788, *supra,* was decided there have been many decisions in the Federal Courts interpreting its meaning. As these decisions have been announced it has become increasingly apparent that there is a fundamental difference of opinion, especially among the various Courts of Appeals, regarding application of the *Clifford* doctrine to long-term trusts. This difference of opinion relates primarily to whether retention of managerial power over the corpus of a long-term trust by the settlor will result in the income of the trust being taxed to the settlor.

The effect of retention by a settlor of dispositional power over the corpus of a long-term trust seems to have been settled by the leading case of *Commissioner* v. *Buck* (CCA 2-1941), 120 F. (2d) 775. The settlor of the long-term trust involved in the *Buck* case had retained power to change beneficiaries at will. The Court of Appeals for the Second Circuit held that retention of such power by the settlor justified treating him as the real owner of the trust corpus and as taxable on the income therefrom. Subsequently, the Courts of Appeals for other circuits unanimously agreed. *Brown* v. *Commissioner* (CCA 3-1942) 131 F. (2d) 640; *Williamson* v. *Commissioner* (CCA 7-1942) 132 F. (2d) 489; *Edison* v. *Commissioner* (CCA 8-1945) 148 F. (2d) 810.

However, no settled rule has developed dealing with the retention by a settlor of managerial power over the corpus of a long-term trust.

In *Hall* v. *Commissioner* (CCA 10-1945) 150 F. (2d) 304, the Court of Appeals for the Tenth Circuit dealt with a long-term trust wherein the settlor had retained *as trustee* the broadest possible powers of management over the corpus of the trust, plus a power to accumulate income. There, too, the settlor had retained a remote possibility of

reverter. The Court held that these powers did not make the settlor the real owner of the trust corpus and therefore that income of the trust could not be taxed as personal income of the settlor. In so holding, the Court stated (p. 307-308):

> "It was the intention of the trustor to grant to himself as trustee the same power to deal with the trust property as he possessed before the establishment of the trust, and it may be argued that this unusual grant of power enabled the trustee to invest the trust funds for his personal advantage and benefit, thereby vitiating the trust entity and realizing the economic gain necessary to produce a taxable income under Section 22(a). It may be conceded that the power to invest trust funds for the trustee's personal advantage and benefit is equivalent to the taxable enjoyment of the trust income, but we cannot say that the absolute power of the trustee to deal with the trust property as if it were his own empowers him to use it for his own personal advantage and gain. Such a construction of the trust instrument would be contrary to the fundamental principles of equity which guide trustees and protect trust property. * * *."

See also the Tenth Circuit's decision in *Jones* v. *Norris* (CCA 10-1941) 122 F. (2d) 6.

The position of the Court of Appeals for the Tenth Circuit in the *Hall* and *Norris* cases was adopted by the Court of Appeals for the Second Circuit in *Cushman* v. *Commissioner* (CCA 2-1946) 153 F. (2d) 510. In the *Cushman* case, the settlor of a long-term trust reserved *as settlor* power to control retention or sale of trust property and to direct investment and reinvestment of trust funds. In addition, he retained *as trustee* power to accumulate income, and, although there was no reversion, the trust instrument made it possible for the settlor to inherit all or part of the trust corpus as the heir of one of the beneficiaries. In ruling that the settlor was not the real owner of the trust corpus and therefore was not taxable on its income, the

Court made the following comments on the settlor's powers of management (p. 514):

> "* * *. It is a question of interpretation whether or not the powers reserved as grantor are held in a fiduciary capacity or for the grantor's own purposes. Ordinarily, they are held in a fiduciary capacity, and have been reserved only because of some special talent or particular source of knowledge of the grantor. If they have been so reserved, the exercise of them is subject to court scrutiny, *Phipps* v. *Com'r, supra;* but if they have been reserved by the grantor for his own purposes, they are subject to no control in their exercise. *Com'r* v. *Branch, supra;* cf. *Helvering* v. *Stuart,* 317 U.S. 154, 63 S. Ct. 140, 87 L. Ed. 154; see Scott op. cit., *supra,* at Section 185. From the grantor's purpose as found by the Tax Court, it seems certain that the powers this petitioner retained as grantor were retained in a fiduciary capacity. It has been suggested that whether or not the powers are fiduciary should be determinative of the income tax consequences of the establishment of a trust. Compare *United States* v. *Anderson,* 6 Cir., 132 F. 2d 98, with *Armstrong* v. *Com'r,* 10 Cir., 143 F. 2d 700. But in the Clifford case, the powers were all conferred upon the trustee and so were all fiduciary powers. Yet the Supreme Court found that they resulted in the economic benefit to the grantor-trustee because the whole trust amounted to a temporary reallocation of income. That is not the situation in this instance and the fact that these powers retained by the grantor may not be used contrary to the best interests of the beneficiaries would seem to remove them from the scope of the philosophy behind the Clifford case and to distinguish this trust from that considered in *Commissioner* v. *Buck, supra,* and *Bush* v. *Com'r,* 2 Cir., 133 F. 2d 1005 where the grantor retained in addition to the right to dispose of the share of a beneficiary predeceasing him, broad powers of control over the trust estate through control of the trustee but had no fiduciary obligations. See Magill, 45 Col. L. Rev. *supra,* at 124, 125."

The decisions of the Tenth Circuit in the *Hall* case and of the Second Circuit in the *Cushman* case were followed

by the First Circuit in *United States* v. *Morss* (CCA 1-1947), 159 F. (2d) 142.

A diametrically opposite view has been taken by the Court of Appeals for the Sixth Circuit in *Miller* v. *Commissioner* (CCA 6-1945), 147 F. (2d) 189. As in the *Hall* case, the settlor in the *Miller* case had retained *as trustee* the broadest possible powers of management over the corpus of the trust, plus a power to accumulate income. He had also retained a remote possibility of reverter. Relying almost exclusively upon these factors, the Sixth Circuit decided that the settlor in the *Miller* case should be taxed on the income from the trust, which was a long-term trust.

Following its decision in the *Miller* case, the Sixth Circuit, in *Shapero* v. *Commissioner* (CCA 6-1948), 165 F. (2d) 811, further indicated its unwillingness to accept the rule of decision in the *Hall* case. In the *Shapero* case the settlor retained *as trustee* "complete and absolute power and authority to direct the payment and conveyance, forthwith or otherwise, of any part or all of the principal of the trust property and estate, as well as any accumulated income therefrom, to the then living beneficiary or beneficiaries thereof, in such proportions as the individual Trustee (or the successor individual Trustee) may think proper." Because of this power to change participations in the trust, the *Shapero* case could well have been decided adversely to the settlor on the authority of *Commissioner* v. *Buck* (CCA 2-1941), 120 F. (2d) 775, *supra*. Nonetheless, the Sixth Circuit chose to ground its decision on the broad powers of management retained by the settlor as trustee. It said (p. 814):

> "It would seem that, under the first paragraph of the trust indenture, the grantor might so amend the document as to permit loans to himself, primarily for his own benefit. The power to vote the trusteed shares was an attribute of substantial ownership. The Tax Court pointed out that 'it was through the trusts that petitioner had control of more than 50 percent of the voted stock.' The Tax Court could not escape the conclusion, nor can this court, that the petitioner 'was

able through his retained powers to continue to benefit economically from the transferred property'."

Thus, a sharp conflict of opinion now exists regarding the effect of retention by a settlor of managerial power over the corpus of a long-term trust. This is perhaps most graphically illustrated by the dissent of Judge Frank in *Cushman* v. *Commissioner, supra.* Judge Frank felt that the decision of this Court in *Stuart* v. *Commissioner* (1942), 317 U.S. 154, 87 L. Ed. 154, made it possible to treat the settlor in the *Cushman* case as the real owner of the trust corpus and as taxable on the trust income. His colleagues did not agree with him, but the Sixth Circuit in the *Shapero* case did and so stated at page 815.

In the present case, the Court of Appeals for the Fourth Circuit has aligned itself with the Sixth Circuit, as the following portions of its opinion indicate (R. 25):

> "* * *. The significant factors in the pending case in support of the District Court's decision are that Wolf had no need for the income from the trusts, that the beneficiaries were his closest relations, that he named himself as trustee and endowed himself in this capacity with full power of control and management, including the right to sell the property at any price he might determine, the right to reinvest the proceeds in any property he might think desirable, the right to rent the property for terms of any duration, and the right to borrow money and secure the loan by mortgage of the property; in other words, as he expressed it in the trust instrument, the right to manage, control and distribute the trust estate for the benefit of the beneficiaries as if the property were absolutely owned by him. Furthermore he retained the right to withhold the income from the beneficiaries and add it to the trust estate, and if the beneficiary should die before his death, the trust property was to revert to him."[1]

[1] It should be noted that *Helvering* v. *Wood* (1940), 309 U.S. 344, 84 L. Ed. 796, establishes that retention of a remote possibility of reverter by the settlor of a trust does not subject the settlor to taxes on the income of the trust.

The factors thus enumerated are the very same factors which the Courts of Appeals for the First, Second and Tenth Circuits have decided were insufficient to justify taxing the settlor of a long-term trust on income of the trust. Cases continue to arise wherein the Commissioner of Internal Revenue seeks to tax to the settlor of a long-term trust on the income of the trust solely because he has retained broad powers of management over the corpus of the trust. The regulations issued by the Commissioner of Internal Revenue with respect to so-called *Clifford* Trusts (Treas. Reg. 111, Sec. 29.22 (a)-21) fail to deal satisfactorily with the problem of whether the settlor of a long-term trust is taxable on the income of the trust where he has retained broad powers of management over the corpus of the trust. Therefore, the intervention of this Court is important and necessary in order to resolve the conflict of opinion now existing with respect to this problem. The present case squarely presents the issue in a fairly uncomplicated form.

Respectfully submitted,

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INDEX

	Page
Opinions below	1
Jurisdiction	1
Questions presented	2
Statute involved	2
Statement	3
Argument	7
Conclusion	14

CITATIONS

Cases:

Allmaier v. *Commissioner*, 116 F. 2d 162, certiorari denied, 312 U. S. 706 — 13

Brown v. *Commissioner*, 131 F. 2d 640, certiorari denied, 318 U. S. 767 — 10

Burnet v. *Wells*, 289 U. S. 670 — 9

Commissioner v. *Barbour*, 122 F. 2d 165, certiorari denied, 314 U. S. 691 — 10

Commissioner v. *Buck*, 120 F. 2d 775 — 10

Corliss v. *Bowers*, 281 U. S. 376 — 9

Cory v. *Commissioner*, 159 F. 2d 391 — 10

Cushman v. *Commissioner*, 153 F. 2d 510 — 12

Griffiths v. *Commissioner*, 308 U. S. 355 — 9

Hall v. *Commissioner*, 150 F. 2d 304 — 12

Helvering v. *Clifford*, 309 U. S. 331 — 6, 9, 10, 11

Helvering v. *Fuller*, 310 U. S. 69 — 10

Helvering v. *Horst*, 311 U. S. 112 — 10

Helvering v. *Stuart*, 317 U. S. 154 — 10

Ingle v. *McGowan*, 189 F. 2d 785 — 10

Kaplan v. *Commissioner*, 66 F. 2d 401 — 13

Kent v. *Rothensies*, 120 F. 2d 476, certiorari denied, 314 U. S. 659 — 13

Miller v. *Commissioner*, 147 F. 2d 189 — 10

Rollins v. *Helvering*, 92 F. 2d 390, certiorari denied, 302 U. S. 763 — 13

Shapero v. *Commissioner*, 165 F. 2d 811, certiorari denied, 334 U. S. 844 — 10

Warren v. *Commissioner*, 45 B. T. A. 379, affirmed, 133 F. 2d 312 — 10

Wickwire v. *Reinecke*, 275 U. S. 101 — 10

Young v. *Commissioner*, 5 T. C. 1251 — 6, 8

277761—53

Statutes and regulations:	Page
Internal Revenue Code (26 U. S. C.):	
Section 22	2, 13
Section 167	13
Revenue Act of 1936, c. 690, 49 Stat. 1648:	
Section 22	3
Section 167	13
Revenue Act of 1938, c. 289, 52 Stat. 447:	
Section 22	3
Section 167	13
Treasury Regulations 111:	
Section 29.22 (a)–21	11
Section 29.167–1	13

In the Supreme Court of the United States

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No. 388

WHEELING DOLLAR SAVINGS AND TRUST COMPANY, AS EXECUTOR OF THE ESTATE OF CHARLES J. WOLF, DECEASED, PETITIONER

v.

F. ROY YOKE, COLLECTOR OF INTERNAL REVENUE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The memorandum opinion of the District Court (R. 1) is unreported. The opinion of the Court of Appeals (R. 19–27) is reported at 204 F. 2d 410.

JURISDICTION

The judgment of the Court of Appeals was entered on May 27, 1953. (R. 27.) A petition for rehearing, filed on June 24, 1953 (R. 28), was denied on July 6, 1953 (R. 61). The petition for a writ of certiorari was filed on October 2, 1953.

The jurisdiction of this Court is invoked under 28 U. S. C., Section 1254.

QUESTIONS PRESENTED

1. Whether the court below erroneously relied on facts outside the record in affirming the decision of the district court.

2. Whether in the circumstances of this case the courts below correctly held that the income of the trusts was taxable as income of the settlor-trustee under the rule of *Helvering* v. *Clifford*, 309 U. S. 331.

STATUTE INVOLVED

Section 22 of the Internal Revenue Code (26 U. S. C. 22) provides in pertinent part:

> (a) *General Definition.*—"Gross income" includes gains, profits, and income derived from salaries, wages, or compensation for personal service * * *, of whatever kind and in whatever form paid, or from professions, vocations, trades, businesses, commerce, or sales, or dealings in property, whether real or personal, growing out of the ownership or use of or interest in such property; also from interest, rent, dividends, securities, or the transaction of any business carried on for gain or profit, or gains or profits and income derived from any source whatever. * * *[1]

[1] The Internal Revenue Code applies only to taxable years beginning after December 31, 1938. However, Section 22 (a) of the Code is the same as the corresponding provi-

STATEMENT

This is an action for the recovery of income taxes paid. (R. 3.) The case was submitted to the District Court on the pleadings, stipulation of facts with exhibits, two affidavits, and briefs. (R. 1.) The District Court dismissed the complaint and gave judgment for the defendant Collector. (R. 1–2.) The Court of Appeals for the Fourth Circuit affirmed. (R. 27.) The facts, largely stipulated (R. 3–14), may be summarized as follows:

The taxpayer is the executor of the estate of Charles J. Wolf, hereinafter called the "decedent," who died testate, a resident of Wheeling, West Virginia, on September 1, 1946. (R. 3.) The deficiencies in income taxes here in question were paid by decedent's estate on September 17, 1947. Timely claims for refund were filed, based solely on the ground that the trust income in issue here was not taxable to the decedent; the claims were rejected and suit seasonably brought. (R. 3.)

The decedent never married. His sole heirs and beneficiaries under his will were Leo Wolf, his brother; Ruth Levi, his sister; Robert Levi, a nephew; Harry Levi, Jr., a nephew; Marc J.

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sions of the Revenue Acts applicable to the earlier years involved here. Act of 1938, c. 289, 52 Stat. 447, Sec. 22 (a); Act of 1936, c. 690, 49 Stat. 1648, Sec. 22 (a).

Wolf, nephew; and Charles H. Wells, nephew. (R. 3, 6–9.)

On November 3, 1937, the decedent (then 63 years old) created five trusts, one for the benefit of his sister and one for the benefit of each of his nephews. The sister, Ruth Levi, was then 59 years old and domiciled in Massachusetts; Robert Levi was 26 and domiciled in Massachusetts; Harry Levi, Jr., was 23 and domiciled in Massachusetts; Marc J. Wolf was 36 and domiciled in Indiana; and Charles H. Wells was 28 and domiciled in Massachusetts. The decedent, at the time of the establishment of the trusts and up to the time of his death, occupied a single room at a hotel in Wheeling, West Virginia. (R. 3–4.)

The five trust instruments, all substantially the same, named the decedent himself as trustee; gave him unrestricted power to sell and invest the trust property and purchase other property; empowered him to borrow money on the security of the trust assets; and summarized the settlor-trustee's extensive powers by stating it to be his "intention to retain as Trustee, such rights, power and authority in respect to the management, control and distribution of said trust estate for the use and benefit of the beneficiary, as I have with respect to property absolutely owned by me." The decedent, as trustee, had power to accumulate the income in his discretion, and to make pay-

ments out of corpus to a beneficiary in case of illness or emergency. The trust for Mrs. Levi was to continue until the decedent's death. Those for the four nephews were likewise to terminate at his death, except that the trust for any nephew under 30 at decedent's death was to continue until the nephew reached 30. The instruments further provided that the assets in the trust for any beneficiary predeceasing the decedent were to revert to the decedent. (R. 9–14.)

The decedent placed $5,000 in each trust upon its creation, filing gift tax returns and paying gift taxes in respect of the transfers. He thereafter maintained a separate bank account, separate records, and separate books of account for each trust. He made no charge and collected no compensation for his work as trustee. He at no time received any of the trust income or principal for his own use or benefit. (R. 5.)

A fiduciary return was filed for each trust for all of the years here involved (1937 to September, 1946) and the taxes shown thereon were paid. Where income was distributed to a named beneficiary, such income was returned by the beneficiary. (R. 5.)

All of the beneficiaries survived the decedent. (R. 3.) The Commissioner determined that the income of the trusts in question was taxable to the decedent, and the resulting deficiencies were paid by the decedent's estate. Income taxes

which had been paid by the beneficiaries were refunded to them. (R. 3, 5.)

The District Court sustained the Commissioner's determination and the court below affirmed, holding that the decedent had retained so many attributes of ownership of the trust properties as to require taxation under *Helvering* v. *Clifford,* 309 U. S. 331. The Court of Appeals noted, as the parties had stipulated (R. 4), that decedent was the Charles J. Wolf referred to in the case of *Young* v. *Commissioner,* 5 T. C. 1251, involving similar trusts created by decedent's business associate, Young. The court pointed out that petitioner here had not shown how the trust funds were invested or what income had been distributed to the beneficiaries; that Young, in his case, had been shown to have "used the trust estates to disguise a distribution to himself of corporate profits in an attempt to escape the income taxes thereon"; and that the Tax Court decision in the *Young* case indicated that the present decedent had made similar use of the trust properties. The court concluded, however, that "even if we should shut our eyes to this fact on the ground that the findings as to Wolf in the *Young* case were not formally included in the stipulation in the pending case, as the [petitioner] urges, the potentialities of enjoyment and control inherent in the Wolf trusts are still graphically illustrated." (R. 26.)

ARGUMENT

1. Petitioner's first contention (Pet. 4, 5–8)—that the Court of Appeals erroneously considered matters outside the record as a basis for its decision—is plainly insubstantial. As petitioner acknowledges (Pet. 7), the elementary principle requiring that each case be decided on its own record has been expressly recognized and followed by the court below, as it is elsewhere. There was no departure from the principle in this case.

In their stipulation comprising most of the facts before the District Court for decision, petitioner and respondent expressly noted that the decedent in this case was "the one and same Charles J. Wolf named in Young v. Commissioner, 5 T. C. 1251." (R. 4.) It was wholly natural and expectable that the court below would refer to the *Young* case and learn that the decedent's business partner, involved there, "under practically identical trust instruments, * * * invested the trust funds in his own theatrical business and used the trust estates to disguise a distribution to himself of corporate profits in an attempt to escape the income taxes thereon." (R. 26.) It was no less proper to remark in passing on the fact that the report of the *Young* decision "indicates that Wolf [the decedent here] made similar use of the trust properties which he held as trustee" (*ibid.*). The

court expressly made it clear, however, that there was no occasion to treat this "indication" in the *Young* opinion as a fact established in this case. What was important here, the court said (*ibid.*), definitively limiting its use of the *Young* case as a wholly appropriate aid in its reasoning, was that "the potentialities of enjoyment and control inherent in the Wolf trusts are still graphically illustrated [by *Young*]."

In the circumstances, petitioner's complaint is baseless. And even if the opinion below left more ground for such an objection, petitioner's position here would scarcely be an appealing one. As the court below remarked, petitioner had "not offered to show what part of the income Wolf paid to the beneficiaries or how he invested the principal and income of the trusts" (R. 26). It made obvious sense to illuminate the problem here by observing that the *Young* case, concerning identical trusts, showed how the decedent *could have* used the trust properties, thus pointing up the substantial ownership he retained. Against this demonstration, petitioner's belated effort to show, on petition for rehearing (see Pet. 4), that Wolf in fact handled his trusts differently from Young is of no moment.

2. The "ultimate" argument on which petitioner seeks review by this Court—the claim that the two courts below erred in holding the trust income taxable to decedent (Pet. 4, 9–14)—is equally without merit. On this issue, the decision

below is simply a correct application to the facts in this case of the rule in *Helvering* v. *Clifford*, 309 U. S. 331.

In the *Clifford* case, the grantor was held taxable upon trust income paid to his wife as beneficiary. The trust there was to continue for five years or until the prior death of the taxpayer or his wife; upon termination of the trust the corpus was to go to the grantor or his estate, but any undistributed net income was to be treated as the wife's property. The grantor named himself as trustee with broad powers of control over the property. This Court concluded that the grantor had retained so many of the attributes of ownership that he "continued to be the owner for purposes of § 22 (a)." 309 U. S. at 335. In reaching this result, the Court reaffirmed the basic rule (see *Corliss* v. *Bowers*, 281 U. S. 376, 378; *Burnet* v. *Wells*, 289 U. S. 670, 678; *Griffiths* v. *Commissioner*, 308 U. S. 355, 357–358) that "Technical considerations, niceties of the law of trusts or conveyances, or the legal paraphernalia which inventive genius may construct as a refuge from surtaxes should not obscure the basic issue." 309 U. S. at 334.

The rule of the *Clifford* case has not been confined to the precise facts there presented, and it has been applied to trusts which were not limited to short terms but were to continue for long or indefinite terms. In determining taxability in such cases, the courts have given weight to a

power retained by the grantor to shift the shares of beneficial interest, even though he could not direct payment to himself.[2] It has been deemed significant that a grantor placed in trust shares of stock in a corporation, or a share in a business, in which he was personally and actively interested.[3] Moreover, the rule is not restricted to cases where the trust beneficiaries are members of the grantor's family or live under the same roof with him; nor is it necessary that the beneficiary be dependent upon the grantor for support.[4]

In a word, each case requires examination of a particular composite of incidents of ownership and control retained by the grantor. The question is one of ultimate fact, to be determined in the light of the trust provisions and other evidence. *Helvering* v. *Clifford, supra,* at 336. So viewing the instant case, it seems clear that the petitioner, upon whom lay the burden of proof (*Wickwire* v. *Reinecke,* 275 U. S. 101, 105),

[2] *Commissioner* v. *Buck*, 120 F. 2d 775 (C. A. 2); *Brown* v. *Commissioner*, 131 F. 2d 640 (C. A. 3), certiorari denied, 318 U. S. 767; *Ingle* v. *McGowan*, 189 F. 2d 785 (C. A. 2).

[3] *Helvering* v. *Fuller*, 310 U. S. 69, 72, 76; *Helvering* v. *Stuart*, 317 U. S. 154, 169; *Miller* v. *Commissioner*, 147 F. 2d 189 (C. A. 6); *Shapero* v. *Commissioner*, 165 F. 2d 811 (C. A. 6), certiorari denied, 334 U. S. 844; *Warren* v. *Commissioner*, 45 B. T. A. 379, 385, affirmed, 133 F. 2d 312 (C. A. 6).

[4] *Cory* v. *Commissioner*, 159 F. 2d 391 (C. A. 3); *Commissioner* v. *Barbour*, 122 F. 2d 165 (C. A. 2), certiorari denied, 314 U. S. 691. And see *Helvering* v. *Horst*, 311 U. S. 112, 117.

has made no showing which even suggests a basis for reversal of the two courts below.

On the contrary, a bare examination of the trust instruments demonstrates the propriety of the tax in this case. The beneficiaries were the grantor's closest relatives and the natural objects of his bounty. The grantor retained as trustee broad powers of control over the properties of each trust, including the right to distribute or accumulate the income. And if he survived the beneficiary, the entire trust estate would revert to the grantor. Thus, he was in a position to use the trust funds in his business and accumulate the income for his own possible benefit.

As long as the decedent lived, he remained in complete control of the trusts, and no beneficiary had the right to demand or receive a single dollar of income or principal without his consent. Taking all the circumstances together, the courts below were right in holding that the grantor remained in substance the owner of the trust funds until he died.[8]

[8] The petitioner mentions (Pet. 14) the Treasury Regulation with respect to the *Clifford* case (Treasury Regulations 111, Section 29.22 (a)–21), which is by its terms applicable only to years beginning after 1945. Accordingly, since most of the taxes involved here arose out of prior years, the Regulation is only of slight interest in this case. It may be noted, however, that the powers retained by the decedent, particularly the power to accumulate for his own possible benefit, were clearly enough to bring all of the income in question within the scope of the Regulation.

Contrary to petitioner (Pet. 9–14), we think it clear that this result creates no conflict with such cases as *Hall* v. *Commissioner,* 150 F. 2d 304 (C. A. 10), and *Cushman* v. *Commissioner,* 153 F. 2d 510 (C. A. 2). As we have said, and as the court below indicated (R. 26), the cases turn on their "various states of fact," and those petitioner invokes differ from the one here. In the *Hall* case, for example, it was "only on the remotest contingency that the trustor could be revested with either the corpus or the income" (150 F. 2d at 307)—only, that is, by surviving four young beneficiaries and their issue. Similarly, in the *Cushman* case, "the possibility that the grantor might ever inherit any of the trust property [was] so remote that it [was] non-existent in the light of probability." 153 F. 2d at 513. Here, on the other hand, the decedent would have taken the property in the trust of any beneficiary who died, including that of a beneficiary only slightly younger than himself. Without extending this kind of factual analysis, it seems sufficient to note that the supposed conflict petitioner asserts reflects at most differences in emphasis which are inseparable from the differences in the varying situations with which the courts have been confronted. There is no such

disagreement on the controlling principles as would warrant review by this Court.*

*Although the court below found it unnecessary to reach the point, we argued below, and will urge here if certiorari is granted, that the tax in this case can be sustained, not only under Section 22 (a), but also under Section 167 of the Internal Revenue Code (and the corresponding provisions of the Revenue Acts of 1936 and 1938; see footnote 1, p. 2, *supra*). Section 167 (a) provides that trust income is taxable as income of the grantor where it—

> (1) is, or in the discretion of the grantor or of any person not having a substantial adverse interest * * * may be, held or accumulated for future distribution to the grantor; or
>
> (2) may, in the discretion of the grantor or of any person not having a substantial interest * * *, be distributed to the grantor * * *.

Treasury Regulations 111, Section 29.167–1, provides that the test of taxability of trust income to the grantor under Section 167 is whether he has failed to divest himself, permanently and definitively, of every right which might, by any possibility, enable him to have such income, at some time, distributed to him, either actually or constructively. The regulation further provides that the inclusion of any trust within the scope of Section 167 is based on the fact that the grantor has retained an interest in the income therefrom by which he is, or may be enabled at some time, to receive its benefits.

Given the decedent's power of accumulation, and the provision that the trust estates would revert to him on death of the beneficiaries, we think Section 167 would require the result reached by the court below under 22 (a). See *Kaplan* v. *Commissioner*, 66 F. 2d 401 (C. A. 1); *Altmaier* v. *Commissioner*, 116 F. 2d 162 (C. A. 6), certiorari denied, 312 U. S. 706; *Kent* v. *Rothensies*, 120 F. 2d 476 (C. A. 3), certiorari denied, 314 U. S. 659; *Rollins* v. *Helvering*, 92 F. 2d 390 (C. A. 8), certiorari denied, 302 U. S. 763.

CONCLUSION

For the reasons stated, it is respectfully submitted that the petition for a writ of certiorari should be denied.

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